An Analysis and Evaluation of Certificate of Need Regulation in Maryland

Nursing Home Services

Summary and Analysis of Public Comments and Staff Recommendation

MARYLAND HEALTH CARE COMMISSION

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I. Introduction

The working paper entitled *An Analysis and Evaluation of Certificate of Need Regulation in Maryland: Nursing Home Services* was developed by staff to the Maryland Health Care Commission as one in a series of working papers examining major policy issues of the Certificate of Need process, as required by House Bill 995 (1999). The paper provides the basis for public comment on the following series of potential alternative regulation strategies:

Option 1: Maintain Existing Certificate of Need Program Regulation

Option 2: Expanded Certificate of Need Program Regulation: Include Level 3 and 3+ Assisted Living Facilities

Option 3: Impose a Moratorium on New Nursing Home Beds

Option 4: Deregulation of Nursing Homes from Certificate of Need Review, with Creation of a Data Collection and Reporting Model to Encourage Quality of Care

Option 5: Deregulation from Certificate of Need Review, with Approval by the Medicaid Program of Any New Nursing Home Beds and Facilities Seeking Medicaid Reimbursement

Option 6: Deregulation of Nursing Homes from Certificate of Need

The objective of this working paper is to provide an overview of issues facing providers of nursing home services in Maryland, and also to present to the Commission a range of alternatives for changes to the CON regulation of nursing home services. The working paper was released for public comment at the MHCC's October 25, 2000 meeting. Seven organizations submitted written comments, which are summarized in Part II of this paper, in response to the Commission's invitation. Staff analysis of the public comments is provided in Part III, and Part IV presents Staff's recommendation to the Commission on continuing to regulate nursing home services in Maryland through CON review. The organizations providing public comment include:

- Erickson Retirement Communities
- Health Facilities Association of Maryland
- Howard County Board of Health
- Johns Hopkins Medicine
- MedStar Health

- Mid-Atlantic Non-Profit Health and Housing Association and the Maryland Assisted Living Association
- The Association of Maryland Hospitals and Health Systems

II. Summary of Public Comments[1]

Erickson Retirement Communities ("Erickson"), a private developer and manager of continuing care retirement communities, opposes Option 1 and strongly supports ending Certificate of Need regulation of nursing homes in Maryland. Erickson takes the position that requiring CON approval for new nursing homes and additional bed capacity "restricts seniors from accessing the care and services they need in the settings they deem are most appropriate," and says that the Certificate of Need requirement has "contributed significantly to the poor quality of care offered in many nursing homes" during the period of high occupancy. Erickson explains that the growth of alternatives to nursing home care, while reducing occupancies, has "improved the overall quality of care" at nursing homes. Requiring CON for one sector of the more diverse long term care industry amounts to "forcing seniors into nursing homes against their will by limiting choice," and "serves only the proprietary interests of nursing homes."

Erickson strongly opposes the expansion of the Certificate of Need program regulation to include Level 3 and 3+ Assisted Living facilities (Option 2 in the Working Paper) as "unwarranted" and "harmful," since CON laws "stifle innovation and competition," which are critical to improving quality. In Erickson's view, the argument that Certificate of Need regulation is required to prevent assisted living facilities from "skimming" private-pay patients who would otherwise go to nursing facilities is "logically flawed" – because the "affluent clientele" of assisted living would seek other alternatives to nursing homes if assisted living were not available -- and "may be morally wrong" if it requires private-pay patients "to offset the cost of caring for Medicaid patients" in nursing homes. As Erickson observes, "Those with resources find alternatives," and should not be restricted from choosing among them.

Erickson's comments also register its opposition to Option 3, the imposition of a moratorium on new nursing home beds. With regard to Options 4 and 5, which would remove the CON requirement on nursing home capacity, and instead impose either a more stringent data collection and reporting model or a required approval by the Medical Assistance Program of any facility proposing to seek Medicaid reimbursement, Erickson is more positive, seeing these measures as steps toward total de-regulation from CON.

As indicated, Erickson strongly supports Option 6, the deregulation of nursing home services from Certificate of Need review. In discussing the advantages of moving from a "protected monopoly" to a free-market, competitive system, Erickson supports alternatives to the present mechanisms for funding long term care. A more effective approach would be to "provide vouchers to Medicaid eligible seniors who could then use

[1] A complete set of the written copies received on the Nursing Home Services Working Paper may be obtained by contacting the Division of Health Resources at 410-764-3232.

those vouchers to purchase the services they need in the settings they deem are most appropriate for them." If the State's Medical Assistance program "is willing to pay a facility $40,000 per year for nursing home care," Erickson reasons, it could also "pay a loving daughter who may be willing to quit her job and stay home to provide care for her mother" if the resources were diverted from the facility.

The **Health Facilities Association of Maryland ("HFAM")** represents primarily for-profit nursing facilities in Maryland, and supports continuation of CON review and regulation of nursing home beds and services. Noting that the CON process has served its purpose well and strongly supporting its continuation, in its comments HFAM goes beyond the scope of the CON study to propose a collaborative dialogue with the Commission on a wide range of planning and policy issues facing its industry. HFAM also suggests that the CON program be modified to permit "additional flexibility," and to provide procedural incentives for needed capital renovations and facility replacements.

Among its suggestions for changes to the CON program, HFAM asks the Commission to consider:

- An expedited and simpler CON process for a relocation of a nursing home within the same community or service area, including modifications to the occupancy threshold requirements and Medicaid Memorandum of Understanding; and

- A higher capital cost threshold for CONs for renovations and replacement facilities.

According to HFAM, virtually every significant renovation proposed by a nursing facility in Maryland today exceeds the Commission's current capital review threshold[2], and therefore requires CON review and approval, which creates a "financial disincentive" for some facilities in considering whether to upgrade or replace their buildings. In HFAM's view, raising the capital cost threshold will stimulate renovations of older nursing home structures, and help to maintain the highest level of nursing home services in the State.

With regard to the Medicaid Memorandum of Understanding ("MOU") requirement in the State Health Plan – which requires a nursing home applicant for CON approval to commit to serving at least as high a percentage of Medicaid recipients as the regional or jurisdictional average – HFAM notes that this approval standard has served an important purpose in assuring Medicaid access in the past, but questions the need to continue the requirement. With Medicaid occupancy percentages substantially increasing in recent years, HFAM believes that Medicaid access is no longer a problem in Maryland. While HFAM does not propose the elimination of the MOU, its comments suggest that it may make sense to modify the MOU requirement to facilitate a relocation of a nursing

[2] The statutory capital review threshold is $1.25 million, but in 1995 the former Health Resources Planning Commission adopted regulations permitting an annual adjustment according to the Consumer Price Index-Urban, which has brought the threshold to its current $1.45 million.

facility to a new site within the same service area, in order to accommodate a jurisdiction's shifts in population and demand.

Finally, HFAM proposes an exception to "the occupancy threshold requirement for relocations with the same service area," asserting that the effect of requiring "the current level of 95% [occupancy] . . . be met for all nursing facilities" in the jurisdiction where a relocation or replacement facility is proposed "virtually assures" that the Commission will approve no relocations in the foreseeable future, given low occupancy rates across the State. [In fact, the State Health Plan standard precluding approval of new or expanded nursing home bed capacity unless the occupancy level of all the county's existing nursing facilities are at 95% occupancy does not apply to capital projects or relocations involving *existing* capacity. See the discussion in Section III.]

In addition to discussing long term care planning and policy issues beyond the scope of the CON study, HFAM advanced its belief that -- while over-capacity presently exists in both nursing home and assisted living facility beds in much of the State -- demographic data show that demand for services, including nursing home services, is likely to increase significantly in the next ten to fifteen years. It is HFAM's view that the present nursing home bed capacity will have to grow to meet the demand, and it urges the Commission to study the entire continuum of long term care services.

HFAM also called on the Commission to recognize the role of the CON program in promoting quality of care in long term care, noting the finding in the American Health Planning Association ("AHPA") study of a positive correlation between capacity controls and quality of care in nursing homes across the country.[3] One historic effect of requiring a CON for market entry has been to prevent occupancy levels from dropping so low that the facility can no longer operate efficiently, and has difficulty paying for staffing and other services that affect quality of care.

The **Howard County Board of Health** suggests raising the present statutory capital review threshold of $1.25 million, which triggers Certificate of Need requirement for nursing home building projects, to $1.5 million for nursing homes, assisted living facilities and any combination of the two categories. [Refer to the Footnote on page 4] The comments by Howard County's Board of Health also emphasize the importance of developing and enforcing strong State licensure and quality standards.

Johns Hopkins Medicine ("Hopkins") supports Option 1, keeping existing CON regulation for nursing home services. Johns Hopkins Medicine believes that this choice represents is the best means of maintaining control over the number of nursing home beds operated in the State of Maryland – a policy direction that encourages the development of less costly alternative settings, without placing further stress on already-critical shortages of highly-skilled staff. Hopkins notes that the Commission has shifted the focus of nursing home CON review over the last several years to the relocation and redevelopment of existing nursing home capacity, and has not increased or decreased the

[3] Maryland Health Care Commission, *Certificate of Need Regulation of Nursing Home Services in the United States*, October 25, 2000, page 17

overall complement of nursing home beds through Certificate of Need. Hopkins believes, as the AHPA report suggests, that the limit on new nursing home capacity imposed by the CON requirement is needed to ensure appropriate growth in capacity, commensurate with demand and high quality care. As evidenced by the AHPA's survey of other states, nursing home services continue to be the most-often regulated service of all services subject to CON review. In Hopkins' judgment, this demonstrates that State government continues to have a compelling interest in the growth of the number of nursing home beds, and its impact on the efficiency of the care that nursing homes provide.

Comments provided by **MedStar Health ("MedStar")** on behalf of its affiliated not-for-profit nursing homes, Good Samaritan Nursing Center and MedStar Manor, reflect its overall position in support of the CON model of regulation as the most comprehensive regulatory tool for implementing the State's health policies and priorities. MedStar has consistently taken a position that Certificate of Need review helps to ensure financial and geographic access to services for all Marylanders, and fosters "optimal quality" and public accountability of providers.

According to MedStar, requiring CON approval for the development of health care services, particularly the more highly skilled services, may be more important in the midst of a severe shortage of skilled, specialized health care professionals. CON regulation of nursing homes also contributes to both the financial viability of the individual facility, by requiring the demonstration of need for new beds or facilities – which in turn helps to control the growth of the State's considerable Medical Assistance budget for institutional long term care services. In MedStar's view, the CON model of regulation ensures slower capacity growth, higher average occupancy, and more efficiently operated facilities.

The Mid-Atlantic Non-Profit Health and Housing Association ("MANPHA") and the Maryland Assisted Living Association ("MALA") responded jointly to this Working Paper after receiving comments from their member providers across the state, which include operators of nursing homes, assisted living facilities, hospital sub-acute units, and continuing care retirement communities. Although their providers "have reservations about the CON process," both MANPHA and MALA support maintaining CON, and "continuing to monitor planning and occupancy data so that the effectiveness of the program can be continuously evaluated." However, MANPHA and MALA recommend a further evaluation of the CON program:

- To determine "whether CON unnecessarily restricts the options of consumers to select the care setting of their choice";
- To "streamline the CON process to encourage efficiency and decrease the significant provider expenses involved"; and
- To determine "the impact of CON on affordability."

These additional factors would better reflect the "increasingly important role of consumer choice in long term care," and also reflect the position taken by several MANPHA

members, predominately CCRCs, that the CON program should be eliminated, "to further enhance consumer choice."

Member providers of both MANPHA and MALA are "strongly opposed" to the expansion of Certificate of Need regulation to include Level 3 and 3+ assisted living facilities (Option 2), for a variety of reasons. First, "assisted living has no Medicaid infrastructure since it is overwhelmingly a private pay market place," unlike nursing home care. While recognizing that the State of Maryland currently provides a number of assisted living subsidies and will soon support a limited number of individuals in a Medicaid waiver program, MANPHA and MALA characterize "the State's investment in assisted living" as "extremely limited," and not in need of protection through CON regulation. The concern of conventional nursing home operators that assisted living providers would care for high rates of growth at the 3 and 3+ levels, has not been born out by Maryland's experience to date, so "the Commission should not undertake regulations to combat a problem that does not exist."

The organizations also believe that CON review "would make affordable assisted living facilities impossible," because the "imposition of CON review and any related legal and administrative expenses would add significantly to the cost of developing assisted living services, and could "stop the development of assisted living facilities that would be targeted at low and moderate income individuals. Furthermore, MANPHA and MALA advise that to comply with the recent federal *Olmstead vs. L.C.* Supreme Court decision, the State will need a variety of lower cost comprehensive care alternatives, including assisted living facilities capable of caring for higher-acuity residents.

Regarding Option 3, the imposition of a moratorium on new nursing home beds, MANPHA and MALA believe that, while "the Commission should continue to monitor the comprehensive care marketplace," to impose a moratorium when there is little or no growth in the nursing facility industry "would not satisfy any policy objective and also would preclude providers from offering new investments in care services."

With regard to Option 4, deregulation from CON review in favor of a data reporting system designed to inform consumer choice and encourage quality care, MANPHA and MALA point out that Medicare and Medicaid already require data collection models that monitor quality, and that federal Health Care Financing Administration ("HCFA") data already provide quality indicators used for quality research and benchmarking. In addition, MANPHA and MALA point out that – responding to a 1999 legislative mandate -- the Commission is already developing a nursing home report card, using a combination of existing data sets, which is intended to help consumers select a nursing home that provides quality care. Duplicative data reporting requirements would not enhance quality, but would instead focus nursing home staff on "paper compliance" as opposed to providing actual quality care to the residents – further exacerbating the current health personnel shortages in long term care.

MANPHA and MALA suggest further study for Option 5, the deregulation of Certificate of Need with approval by the Medicaid program of any new nursing home

beds and facilities seeking Medicaid reimbursement. This option would place the barrier to market entry within the scope of the Medicaid program, which the organizations note has been the primary beneficiary of controlling the growth of nursing home bed capacity. Consequently, this step could help streamline the market entry process for both facilities seeking Medicaid reimbursement, and those that do not, and foster a closer coordination between the Commission's planning activities and Medicaid.

The Association of Maryland Hospitals and Health Systems ("MHA") also supported maintaining the current CON requirement for nursing homes, citing the benefits to Marylanders from the CON program's protection against the overbuilding of long term care facilities, protection of the solvency of the Medicaid budget, and making certain that sufficient resources are available. MHA also indicated its support of the comments submitted by MANPHA and HFAM, noting particularly the need to periodically re-evaluate existing regulatory procedures and policies to meet the needs of both providers and consumers. MHA proposed that the Commission consider injecting additional flexibility and incentives into the CON process for nursing homes to make needed improvements in physical plant and services.

III. Staff Analysis of Public Comments

A. Option 1: Maintain Existing CON Regulation

Most of the organizations that submitted comments in response to the range of possible changes to the Certificate of Need regulation of nursing home beds and facilities in Maryland strongly support the continuation of the existing CON program. The consensus among those supporting CON for nursing homes is that this regulatory tool represents, in MedStar's words, "the State's most comprehensive regulatory tool to ensure quality of care, slower capacity growth, higher average occupancy, and more efficiently operated facilities." Both MedStar and Johns Hopkins Medicine, corporate entities representing two of the State's largest and most diverse health systems, cite the relationship between the rational and responsible limitation of nursing home bed capacity, and the ability and resources to maintain quality of care, as an important reason to keep CON. MHA concurs that CON "has benefited the citizens of the state by protecting against the overbuilding of long-term care facilities, protecting the Medicaid budget, and ensuring sufficient but not excessive resources area available."

Implicitly, Johns Hopkins Medicine identifies the linkage between CON review and the State Health Plan -- whose need projections, review standards, and policy goals are implemented through CON decisions -- as the most important reason to continue CON review for nursing homes. Responding to the option of having Medicaid assume responsibility for approving nursing homes proposing to accept its recipients -- while deregulating other proposed nursing facilities from CON review – Hopkins explains that the multi-dimensional "health care planning function served by the Commission" is very different from that of the Medicaid program. Through CON review, the Commission brings "projections of future need, program review, and assessing reasonableness of construction costs" to bear on its analysis of a proposed project. Since "this expertise

resides with the Commission," Hopkins recommends that the Commission remain the reviewing authority, through the CON program.

Another point of consensus among the commenters is that the Commission should continue to re-evaluate the procedural rules and incentives provided by the Certificate of Need program as the health care system continues to evolve, and as the population ages. In their joint comments expressing support for continuing CON review for nursing homes, MANPHA and MALA recommended that the Commission should continue to monitor planning and occupancy data so that the effectiveness of the CON program can be continuously evaluated. MHA concurred that CON regulations -- as they apply to acute care, long term care, or any regulated provider group – should be "periodically examined, if needed, streamlined," to adjust for "a changing marketplace." HFAM requested that the Commission consider two specific changes, one to the CON review process, and the other involving what actions require CON review and approval.

Commission Staff strongly agrees that both procedural and coverage issues in CON review should be continually re-evaluated. Beginning with major changes to the CON review process it proposed and implemented in 1995, which dramatically reduced the time and transactional costs incurred to obtain CON decisions, Staff has continued to re-evaluate and refine the CON review process. CON review requirements may also be affected by the concurrent updating of the State Health Plan (discussed further below), in key policy areas including access to nursing home care by Medicaid patients, relocations or reconfigurations of services between members of merged asset health system, and incentives for renovation or construction of replacement facilities.

With regard to the issue of CON review for the capital construction costs involved in major renovation or facility relocation/replacement projects, both HFAM and MANPHA urged greater "flexibility" in determining what level of project should require full CON review. The Commission has historically sought a balance between its responsibility to scrutinize proposed capital expenditures -- since Medical Assistance builds capital cost allowances into a nursing home's reimbursement rates -- and its desire to see obsolete physical plants upgraded or replaced, and to expedite reviews of these proposals.[4]

However, Staff takes issue with the comment that the CON requirement for capital projects over the current inflation-adjusted review threshold of $ 1.45 million has prevented renovation or replacement projects from being proposed, and approved by the Commission. As the Working Paper described and depicted in table form, numerous projects to relocate and reconfigure existing capacity, to construct replacement facilities or to undertake major renovations have been reviewed and approved during the last three years – a period in which no new bed capacity was approved through CON review. The former Health Resources Planning Commission (HRPC) granted CONs for replacement

[4] HFAM's comments erroneously state that the State Health Plan occupancy threshold that prohibits the approval of a CON application for new or expanded nursing home capacity unless all of the existing facilities in a jurisdiction area at or above 95% occupancy also applies to CON applications for capital renovation or construction projects.

facilities (or major renovations, costing $5 million or more) to Homewood at Crumland Farms in Frederick County, and Brooke Grove Nursing and Rehabilitation Center, Collingswood Nursing Center, and Hebrew Home of Greater Washington in Montgomery County. During the same period, the HRPC issued CONs to four innovative projects in which existing nursing home bed capacity would be relocated and redeveloped as the core of a new long term care facility offering a broader continuum of service settings, including both assisted living and subacute care.

At the same time, Staff has indicated a willingness to explore an increase to the current $1.45 million capital review threshold. Staff is also reviewing the advantages and disadvantages of the Medical Assistance Program MOU as a condition of CON approval.

With respect to the HFAM proposal that the Commission establish an "expedited and simpler CON process for a relocation within the same community or service area." Staff believes that the current process for considering relocations is both expeditious and collaborative, while at the same time ensuring public notice of – and opportunity to comment on -- proposed nursing home redevelopment projects. Procedural changes enacted in 1995 removed the single most complex and costly part of CON review – the holding of an evidentiary hearing in virtually every contested case. As noted above, this change greatly reduced the time and cost of obtaining a Commission decision. In CON reviews of proposed replacements for active nursing facilities, need for the bed capacity is presumed, and the review focuses on the reasonableness of the construction costs, the financial viability of the project, and the facility's continued compliance with State Health Plan quality standards. In addition, Staff provides considerable technical assistance to potential applicants to further expedite the process.

Another issue raised in the comments on the Working Paper involves the importance of the Commission continuing to collect and analyze data on the entire continuum of long term care services as the system keeps evolving, and the population continues to age. The comments from HFAM noted that the Commission has decided to stop collecting resident data from assisted living facilities beginning next year. HFAM questioned how the Commission would be able to obtain important information about the needs of assisted living residents to compare with individuals who use other services in the long-term care continuum. The former Health Resources Planning Commission (HRPC) began collecting data from assisted living facilities, which were then referred to as domiciliary care facilities, in the early 1990's. This survey was modeled after the nursing home survey and included three components: a one-day (December 31st) resident census; a survey of calendar year discharges; and a facility profile survey.

However, with the creation of the assisted living licensure category several years ago, the number of facilities that potentially would be included in this data base increased from less than 100 to several thousand. While Staff agrees that it is important to collect data from assisted living facilities and use that information in planning for long term care services, an outstanding issue concerns how responsibility for collecting that data should be assigned and how funding for that data collection should be budgeted. As an interim

strategy, the Commission has modified the survey to focus on larger facilities and conducting the facility profile component which collects aggregate data describing facility characteristics, utilization, and charges.

In the context of its strong support for continuing the Certificate of Need requirement for nursing homes, and in addition to its question highlighting the need for more extensive data collection, HFAM also proposed a series of policy questions for the Commission's broader consideration, as it determines how best to plan for and regulate long term care services to meet the needs of Maryland residents in the future. These questions go beyond the scope of the present study of CON regulation of nursing homes, and indeed go beyond the scope of Certificate of Need as a tool to implement the Commission's policies. The policy development and public debate on these issues are the province, and purpose, of the State Health Plan. Because the Commission is also in the process of updating the chapter of the State Health Plan that focuses on long term care services (COMAR 10.24.08), a discussion on these important issues is very much in order – albeit part of another, parallel undertaking already begun.

The update of the Long Term Care chapter of the Plan will be based on four documents, two of which have already been released by the Commission:

- ***Environmental Assessment: Nursing Home Issues and Trends*** (presented at the July 2000 Commission meeting);
- ***Maryland Long Term Care Chartbook 2000*** (presented at the August 2000 Commission meeting*);*
- ***Policy Options Working Paper***— February 2001; and
- ***Long Term Care Facilities and Services Plan***—Spring 2001.

The Commission already initiated the collaborative dialogue that HFAM requested on crucial issues facing the long term care industry, and this work plan provides the forum in which the issues will be explored and policy directions developed. Comments received from the industry and others on any of the Plan-related work products will be incorporated into the updated State Health Plan chapter. Also, understanding that the evolution of the industry and the underlying demographic and cultural changes helping to shape that evolution are a moving target, the Commission plans to develop a work group following this process, that will continue to work with providers and their representatives, to assess further developments and future trends in long term care.

It is important to understand that the Commission will address the emerging policy issues HFAM raises – the impact on demand for traditional nursing home services of the aging "baby boom" generation, the impact of increasing acuity in assisted living residents on nursing homes, the impact of new reimbursement models and policies on the entire range of long term care services, the critical shortages of nurses and other health professionals – in the State Health Plan. The role of the Certificate of Need process, under discussion here, will be, as it has been historically, to apply the standards and incentives outlined in the State Health Plan in its review of proposed projects seeking to transform those policies into new -- or improved -- health care services.

B. Option 2: Expanded Certificate of Need Program Regulation: Include Level 3 and 3+ Assisted Living Facilities

None of the public comments supported Option 2, although as noted above, HFAM does raises the question of CON review for assisted living facilities as part of its broader policy and planning issues. This view is at variance with that of **MANPHA and MALA,** whose member providers strongly oppose Option 2, and of Erickson Retirement Communities, which believes that expansion of the CON process into assisted living would "stifle innovation and competition, both of which are critical to improving quality."

The Working Paper does not advocate CON regulation of assisted living, nor is Staff proposing any change from the State's policy, as articulated in 1996 legislation, to promote the development of a more residential, less medical model for long term care. However, Staff notes that the interrelated nature of services across the long term care continuum requires a detailed, quantified understanding of how assisted living services are used in Maryland, and by whom.

C. Option 3: Impose a Moratorium on New Nursing Home Beds

No organization that commented on this option supported the approach taken by numerous states in response to falling nursing home occupancies, the imposition of a statutory cap on the creation of new nursing home capacity. Staff believes that Maryland's current framework is preferable. Although the Commission will not docket CON applications for new capacity when no new bed need is projected, it monitors changes in bed capacity and inventory, regularly collecting and analyzing data that is used to periodically update both the State's bed need projection and also the assumptions upon which the projection is based. In this way, the Commission can track the aging of the population, changing use patterns of the various settings of care, and other significant developments in the long term care industry, and respond appropriately.

D. Option 4: Deregulation of Nursing Homes from Certificate of Need Review, with Creation of a Data Collection and Reporting Model to Encourage Quality of Care

As the Working Paper noted, this option – minus deregulation from Certificate of Need – has already been enacted by the legislature in 1999, in response to concerns at both the federal and state level about the monitoring of quality of care in nursing homes. Commission Staff is preparing a required interim report to the General Assembly on the implementation of this program, which is to produce a nursing home "report card" oriented toward the prospective residents of nursing homes and their families.

E. Option 5: Deregulation of Certificate of Need Review, with Approval by the Medicaid Program of Any New Nursing Home Beds and Facilities Seeking Medicaid Reimbursement

Public comment on this option ranged widely. Hopkins believes that the Medical Assistance program does not have the health planning perspective and expertise needed to make decisions about system capacity that will affect all payers and facilities. Erickson, on the other hand, believes that any move toward total deregulation from Certificate of Need is a step in the right direction. Occupying a middle ground, MANPHA and MALA support further examination of this option, since it gives to Medicaid the responsibility for protecting its own budget through limiting bed capacity.

Staff does not recommend this option. Not only is nursing home care so costly that many residents who remain in a facility for a significant time will spend down to become a Medicaid recipient, but there is also some potential that dividing bed and facility capacity into Medicaid versus non-Medicaid will foster a two-tier system of care.

F. Option 6: Deregulation of Nursing Homes from Certificate of Need Review

This option has the strong support of Erickson Retirement Communities, and MANPHA and MALA also observe that some of their members believe that eliminating CON review will enhance consumer choice. Erickson's comments suggest that CON regulation of nursing homes has limited the supply of alternative settings of long term care, and has forced people "into nursing homes against their will," thus serving the "proprietary interests of nursing home providers."

Staff knows of no evidence that CON review of nursing home services has restricted either the dramatic growth of the broad range of alternatives to nursing home care, or the ability of consumers to choose among them. The "protected monopoly" described by Erickson has not prevented its organization from pursuing an extremely successful strategy of developing continuing care retirement communities, whose nursing home beds are entirely excluded from CON review. In addition, a statutory change effective in July 2000 permits CCRCs to admit members of the public directly to the community's nursing facility; although statute prescribes limitations to this permission, this measure further expands the ability of CCRCs like Erickson's to establish services outside the scope of CON review.

Erickson's criticism of CON review of nursing home services as contributing to "poor quality" in nursing homes in Maryland is refuted by the data and findings of AHPA's study of nursing homes nationwide, and by the comments submitted by all other organizations that responded to the Working Paper.

Interestingly, while Erickson identifies CON review of non-CCRC nursing home beds and facilities as the factor that restricts consumer choice of long term care setting,

and "forces people into nursing homes against their will," another factor it blames for determining where residents of Maryland receive long term care has far more impact. As Erickson observes, "Those with resources find alternatives." While private pay patients may choose with virtually no restriction, the reimbursement policies of public payers, particularly Medicare and Medicaid, have channeled recipients into higher-cost, more institutional settings. While waivers from these policies and resulting pilot projects are beginning to shift this institutional bias, Staff agrees with Erickson that finding a rational and responsible means of bearing the increasing costs of long term care must become a priority, and will require creative thinking and real cooperation between government and providers.

IV. Staff Recommendation

Based on an analysis of the comments received on its working paper and the strong consensus they present, *An Analysis and Evaluation of Certificate of Need Regulation in Maryland: Nursing Home Services*, Commission Staff recommends that the Commission continue to regulate nursing facilities under the Certificate of Need program, as "the most comprehensive regulatory tool for implementing health policies" that ensure financial and geographic access to services, optimal quality among providers, and accountability to the public.

Staff agrees with the consensus among the commenters that the Commission should continue to re-evaluate the Certificate of Need program – its procedural rules and incentives, as well as the State Health Plan policies and goals it implements through project review and approval – as the health care system continues to evolve, and as the population ages. Staff believes that the update of the State Health Plan chapter addressing nursing home services – which is proceeding on a separate but parallel track to this evaluation of CON regulation -- will provide the opportunity and the appropriate forum to consider the important public policy issues raised by the industry and its representatives, including access by Medicaid residents, quality of care concerns, and the criteria and standards for reviewing proposals to renovate and replace existing nursing facilities.